(3)

No. 10-82

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

RICARDO GONZALEZ,

Respondent.

Motion for Leave to Proceed In Forma Pauperis

Respondent Ricardo Gonzalez seeks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis.

Respondent was represented at trial and on appeal by the Federal Defenders of Eastern Washington and Idaho, counsel appointed pursuant to 18 U.S.C. § 3006A, and is presently represented by the

//

//

Federal Defenders of Eastern Washington and Idaho.

Dated: August 12, 2010.

Respectfully submitted,

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Proof of Service

STATE OF WASHINGTON)
: ss
COUNTY OF YAKIMA)

Rebecca L. Pennell, being first duly sworn, deposes and says:

That I am a member of the Bar of the United States Supreme Court and the State of Washington. I am employed by the Federal Defenders of Eastern Washington and Idaho as counsel appointed to represent Respondent;

That I have prepared the brief in opposition pursuant to my obligations to represent indigent defendants in federal court and at the

request of the Respondent;

On August 12, 2010, the Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case was sent by United States mail to the Clerk of the Supreme Court within the time allowed by the Court's rules;

An additional copy of the Brief in Opposition was served on counsel for Petitioner by placing the same in the United States mail addressed to:

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Subscribed and Sworn to before me this 12th day of August, 2010.

MARY C. DEHNHOFF NOTARY PUBLIC STATE OF WASHINGTON My Comm. Expires May 01, 2011

Notary Public in and for Yakima County, Washington.
Commission Expires: 5/1/11

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On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

BRIEF OF RICARDO GONZALEZ IN OPPOSITION

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QUESTION PRESENTED

In *Griffith v. Kentucky*, the Court held that *all* new rules of criminal procedure must be applied retroactively to cases on direct review, even those marking a clear break with the past. Should the Court overturn *Griffith*'s clear rule by carving out a special exception for the Fourth Amendment, so that retroactive application of *Arizona v. Gant* would not permit a remedy for the small class of litigants whose cases are pending direct review and who have preserved objections to searches that took place prior to *Gant*?

TABLE OF CONTENTS

Question Presented. i

Table of Authorities. iii

Statement. 1

Reasons for Denying the Petition. 10

A. Review Should Be Denied Because the Government Has Previously Represented to this Court that *Gant* Controls. 10

B. The Issue Presented Does Not Involve an Enduring Problem, Affecting a Large Number of Cases. 11

C. The Issue Before the Court Has Already Been Decided by Well-Established Retroactivity Precedent That Requires Application of "New Rules" to All Cases on Direct Appeal. 15

1. *Gant* itself recognized retroactive application of the suppression remedy. 15

2. The Court's retroactivity jurisprudence has rejected a good faith exception to the exclusionary rule for "new" Fourth Amendment rules. 18

D. Stare Decisis Counsels Against Accepting the Government's Invitation to Hold that *Gant* Overruled *Belton*. 23

Conclusion. 25

TABLE OF AUTHORITIES

FEDERAL CASES:

Arizona v. Gant, 129 S.Ct. 1710 (2009) ..... passim
Briscoe v. Virginia, 130 S.Ct. 1316 (2010) 25
Chimel v. California, 395 U.S. 752 (1969) 21
County of Sacramento v. Lewis, 523 U.S. 833 (1998) 17
Danforth v. Minnesota, 552 U.S. 264 (2008) 22
Desist v. United States, 394 U.S. 244 (1969) 19, 21
Griffith v. Kentucky, 479 U.S. 314 (1987) 6, 7, 18-20, 23
Groh v. Ramirez, 540 U.S. 551 (2004) 16
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 17
Herring v. United States, 129 S.Ct. 695 (2009) 7, 8
Illinois v. Krull, 480 U.S. 340 (1987) 8
Katz v. United States, 389 U.S. 347 (1967) 21
Kimbrough v. United States, 552 U.S. 85 (2007) 24
Linkletter v. Walker, 381 U.S. 618 (1965) 19-21
Mackey v. United States, 401 U.S. 667 (1971) 19, 21
Malley v. Briggs, 475 U.S. 335 (1986) 16
Mapp v. Ohio, 367 U.S. 643 (1961) 23
Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009) 25
Moore v. United States, 129 S.Ct. 4 (2008) 24
Nelson v. United States, 129 S.Ct. 890 (2009) 24
New York v. Belton, 453 U.S. 454 (1981) 3, 4, 12, 14, 23, 24
Pearson v. Callahan, 129 S.Ct. 808 (2009) 16, 24
Rita v. United States, 551 U.S. 338 (2007) 24
Spears v. United States, 129 S.Ct. 840 (2009) 24
Stovall v. Denno, 388 U.S. 293 (1967) 19
Thornton v. United States, 124 S.Ct. 2127 (2004) 3, 4, 12
United States v. Davis, 569 F.3d 813 (8th Cir. 2009) 12
United States v. Davis, 598 F.3d 1259 (11th Cir. 2010) 22, 23
United States v. Engle, 677 F.Supp.2d 879 (E.D. Va. 2009) 13
United States v. Grooms, 602 F.3d 939 (8th Cir. 2010) 12

FEDERAL CASES – Continued:

United States v. Hairston, No. 09-40033-02-JAR (D. Kan. Oct. 15, 2009) 12
United States v. Harris, No. 09-00385-01-CR-W-DGK (W.D. Mo. April 22, 2010) 12
United States v. Hrasky, 567 F.3d 367 (8th Cir. 2009) 14
United States v. Jackson, 825 F.2d 853 (5th Cir. 1987) 8
United States v. Johnson, 457 U.S. 537 (1982) 7, 20
United States v. Kellam, 568 F.3d 125 (4th Cir. 2009) 12
United States v. Leon, 468 U.S. 897 (1984) 17, 21
United States v. McCane, 573 F.3d 1037 (10th Cir. 2009) 8, 22
United States v. McGhee, 672 F.Supp.2d 804 (S.D. Ohio 2009) 12
United States v. McNair, 364 Fed.Appx. 54 (4th Cir. 2010) 13
United States v. Perez, No. 09-233 (E.D. Penn. Jan. 15, 2010) 12
United States v. Real Property Located at 15324 County Highway E., 332 F.3d 1070 (7th Cir. 2003). 9
United States v. Robertson, Nos. CIV-10-76-C, CR-07-56-C (W.D. Okla. May 21, 2010) 13
United States v. Ruckes, 586 F.3d 713 (9th Cir. 2009) 13
United States v. Scroggins, No. 09-00060-01-CR-W-DW (W.D. Mo. Feb. 26, 2010) 13
United States v. Stitt, No. 09-4401 (4th Cir. June 8, 2010) 13
United States v. Taylor, 592 F.3d 1104 (10th Cir. 2010) 13
United States v. Vinton, 594 F.3d 14 (D.C. Cir. 2010) 12

STATE CASES:

Bishop v. State, 308 S.W.3d 14 (Texas App. 2009) 13
Brown v. State, 24 So.3d 671 (Fla. App. 2009). 12
Merchant v. State, 926 N.E.2d 1058 (Ind.App. 2010) 12
People v. Arnold, 914 N.E.2d 1143 (Ill.App. 2009) 9
People v. McCarty, 229 P.3d 1041 (Colo. 2010) 9
Pineda v. People, 230 P.3d 1181 (Colo. 2010) 13
Smith v. Commonwealth, 683 S.E.2d 316 (Va.App. 2009) 9
State v. Afana, 233 P.3d 879 (Wash. 2010) 14

STATE CASES – continued:

State v. Baker, 229 P.3d 650 (Utah 2010) 22, 23
State v. Gant, 162 P.3d 640 (Ariz. 2007) 4, 10
State v. Gutierrez, 863 P.2d 1052 (N.M. 1993) 14
State v. Johnson, No. WD 70167 (Mo.App. July 13, 2010) 9
Thompson v. State, No. 2151 (Md. App. May 27, 2010) 13
Valesquez v. Commonwealth, No. 2009-CA-147-MR
(Ky.App. Feb. 19, 2010) 9

OTHER AUTHORITIES:

Paul J. Mishkin, *Foreward: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1954) 19

STATEMENT

Ricardo Gonzalez was convicted of illegally possessing a firearm that was seized in violation of the Fourth Amendment, pursuant to the rule in *Arizona v. Gant*, 129 S.Ct. 1710 (2009). The government has conceded the violation and has agreed that *Gant* must be applied retroactively to Mr. Gonzalez's case. Nevertheless, the Petition claims that retroactive application of *Gant* does not mean Mr. Gonzalez receives a remedy. According to the Petition, the "good faith" exception to the exclusionary rule should apply instead. Because the government's position is contrary to well-established rules on retroactivity, as well as the government's own prior position in this case, review should be denied.

1. During the early morning hours of June 19, 2006, Yakima Police Department Officer Andy Garcia stopped a red Pontiac for being operated without illumination of the rear license plate. There were four people in the car. A woman named Elizia Davila was driving. The Respondent, Ricardo Gonzalez, was in the front passenger seat and there were two passengers in the back seat, a man named Silviano

Rivera and a woman named Lisia Ibarra. The Pontiac belonged to Mr. Gonzalez's girlfriend, who was not present. Mr. Gonzalez was the bailee of the vehicle. Although none of the occupants gave any cause of suspicion, Officer Garcia ran all passengers' names for warrants. Mr. Rivera's name turned up positive.

Upon discovering the warrant, Officer Garcia arrested Mr. Rivera and took him into custody. The other occupants were then ordered out of and away from the car, after which Garcia performed a search of the car. Up until that point, Officer Garcia had no reason to believe that any of the vehicle's occupants were engaged in threatening conduct or involved in any illegal activity. C.A. E.R. 18-19, 44. Garcia made sure that none of the vehicle occupants had access to the Pontiac during his search. Instead, all the occupants were safely "sidelined" away from the car. C.A. E.R. 79. Officer Garcia's search uncovered a gun located in the vehicle glove compartment. Because Mr. Gonzalez has a prior felony conviction, he was charged in federal district court with being a felon in possession of a firearm.

2. During the district court proceedings, Mr. Gonzalez filed a motion to suppress. In his motion, Mr. Gonzalez argued that "the Supreme

Court decision in *Thornton v. United States*, 124 S.Ct. 2127, 2132 (2004), limited the *Belton*[1] rule to those cases where law enforcement had reason to believe that evidence of the crime for which the individual was arrested would be found in the vehicle." Appendix D (14a). While making this argument, Mr. Gonzalez also appropriately recognized that controlling Ninth Circuit precedent held otherwise.

In response to Mr. Gonzalez's motion, the government never argued that Mr. Gonzalez's position regarding *Belton* was irrelevant because the "good faith" exception to the exclusionary rule would justify Officer Garcia's search. Instead, the government addressed Mr. Gonzalez's Fourth Amendment argument on the merits and argued that it was contrary to controlling Ninth Circuit precedent. The district court agreed with the government's approach and denied Mr. Gonzalez's motion. Appendix D (10-15a).

3. Subsequent to the district court's suppression ruling, Mr. Gonzalez was convicted after a jury trial. On appeal, Mr. Gonzalez again argued that the vehicle search was unconstitutional pursuant to the reasoning of the Justices in *Thornton*, and especially the

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[1] *New York v. Belton*, 453 U.S. 454 (1981).

concurrences authored by Justices O'Connor and Scalia. Once again, the government never claimed that Mr. Gonzalez's position regarding *Belton* was moot. Instead, after citing controlling Ninth Circuit case law, the government conceded that Mr. Gonzalez had preserved his objection to the car search in the event that the Supreme Court decided to revisit the issue. Gov't C.A. Brief 14. The Ninth Circuit rejected Mr. Gonzalez's position regarding *Belton* and affirmed the ruling of the district court in an unpublished memorandum decision. Appendix C (7-9a).

4. On October 17, 2008, Mr. Gonzalez filed a petition for writ of certiorari with this Court, No. 08-7096. The petition was consolidated with the case of Alexander Quintana. The only issue raised in the petition was the constitutionality of the vehicle search, pursuant to the reasoning set forth in the concurring opinions in *Thornton*. At the time Mr. Gonzalez filed his petition, the case of *State v. Gant*, 162 P.3d 640 (Ariz. 2007), *cert. granted*, 128 S.Ct. 1443 (Feb. 25, 2008)(No. 07-542), was pending before the Court. In response to the petition, the government conceded that Mr. Gonzalez's case was similar to *Gant* and that his "petition for a writ of certiorari should be held pending the

decision in *Arizona v. Gant*, No. 07-542, and then disposed of in accordance with the Court's decision in that case." On May 4, 2009, the Court issued an order granting Mr. Gonzalez's petition and remanding for reconsideration in light of *Arizona v. Gant*, 129 S.Ct. 1710 (2009). Appendix B (6a).

5. On remand to the Ninth Circuit, the court processed Mr. Quintana's case more expeditiously than Mr. Gonzalez's case. On May 5, 2009, the court of appeals ordered the parties in Mr. Quintana's case to file supplemental briefing on the impact of *Gant*. On May 20, 2009, the government filed a short letter brief, conceding that the search in Mr. Quintana's case had violated *Gant*. The government then requested that the Court "reverse the defendant's conviction and remand the matter to the district court with instructions to grant the defendant's motion to suppress." C.A. No. 07-30402, Doc. 32. On July 14, 2009, the Ninth Circuit issued an order, adopting the government's proposal. The district court then dismissed Mr. Quintana's case on July 15, 2009.

The Ninth Circuit did not order supplemental briefing in Mr. Gonzalez's case until June 8, 2009. On June 23, 2009, the government filed a brief arguing, for the first time, that the outcome of Mr.

Gonzalez's case should be controlled by the "good faith" exception to the exclusionary rule. The government specifically conceded that the vehicle search was unconstitutional under *Gant*. However, the government claimed that this violation should have no effect on the outcome of Mr. Gonzalez's case because Officer Garcia was justified in relying on pre-*Gant* case law as a basis for the search. Mr. Gonzalez argued that the "good faith" exception to the exclusionary rule was inapplicable and, instead, his case was controlled by *Gant* through the retroactivity rule of *Griffith v. Kentucky*, 479 U.S. 314 (1987).

On August 24, 2009, the Ninth Circuit issued an opinion agreeing with Mr. Gonzalez. Appendix A (1a).The appellate court recognized that this Court has never applied the good faith exception to an officer's reliance on case law. Appendix A (3a). Instead, the court explained that Mr. Gonzalez's case was controlled by longstanding precedent holding that, under *Griffith*, new rules of criminal procedure are to be applied retroactively to all cases on direct review. Appendix A (4a).

6. The government filed for rehearing before the Ninth Circuit. During this round of briefing, the government not only conceded a *Gant* violation, but also agreed that *Gant* must be applied retroactively to

Mr. Gonzalez's case. Rehearing Petition at 6-7 ("The government agrees that the two cases on which the panel relied, *United States v. Johnson*, 457 U.S. 537 (1982), and *Griffith v. Kentucky*, 479 U.S. 314, 329 (1987), require this Court to apply *Gant*'s Fourth Amendment holding to the present case"). Nevertheless, the government claimed that, pursuant to *Herring v. United States*, 129 S.Ct. 695 (2009), the exclusionary rule was not an appropriate remedy for the violation of Mr. Gonzalez's rights.

The Ninth Circuit denied rehearing. Appendix F (23a). The original panel filed an opinion, concurring in this determination. As explained by the panel, application of the exclusionary rule to Mr. Gonzalez's case is not only required by this Court's retroactivity jurisprudence, but by *Gant* itself. Appendix F (25a, 30-32a). The Court in *Gant* had considered the cost/benefit analysis relevant to the exclusionary rule and held that enforcement of the Fourth Amendment right to privacy must prevail. Appendix F (25a). The Court held fast to this decision, despite concerns raised in the dissenting opinion that it would result in "suppression of evidence gathered in many searches carried out *in good faith reliance* on well-settled case law." Appendix 4

(32a), (quoting *Arizona v. Gant*, 129 S.Ct. 1710, 1726 (2009)(Alito, J., dissenting) (emphasis added by Ninth Circuit opinion)).

The Petition's claim that the Ninth Circuit panel treated the exclusionary rule as a personal right is inaccurate. Petition at 15-16. The lower court's discussion of a defendant's right to seek suppression referred to rights created and required by this Court's retroactivity jurisprudence. Because Mr. Gonzalez's case was not final at the time of *Gant*, the panel correctly recognized that he enjoys the right to demand vindication, through the remedy of suppression, of what *Gant* recognized as a violation of his Fourth Amendment rights.

Seven of the Ninth Circuit's 25 active judges joined in a dissent to the denial of rehearing. Appendix F (33a). The dissenting judges claimed that the good faith exception should be extended to law enforcement searches conducted in reliance on case law, pursuant to *Herring v. United States*, 129 S.Ct. 695 (2009), and *Illinois v. Krull*, 480 U.S. 340 (1987). In support of this position, the dissenting judges pointed to decisions from other circuits, such as *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009), and *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987)(en banc).

7. Numerous appellate courts share the Ninth Circuit's understanding of retroactivity. *See, e.g., United States v. Real Property Located at 15324 County Highway E.* 332 F.3d 1070, 1076 (7th Cir. 2003)(good faith exception does not extend to reliance on subsequently overruled case law); *People v. McCarty*, 229 P.3d 1041, 1045-46 (Colo. 2010); *People v. Arnold*, 914 N.E.2d 1143, 1157 (Ill.App. 2009); *Valesquez v. Commonwealth*, No. 2009-CA-147-MR, 2010 WL 567325 (Ky.App. Feb. 19, 2010)(pending publication); *State v. Johnson*, No. WD 70167, 2010 WL 2730593 (Mo.App. July 13, 2010)(pending publication); *Smith v. Commonwealth*, 683 S.E.2d 316, 327 (Va.App. 2009). As does the Ninth Circuit, the aforementioned courts recognize that this Court's rule, requiring retroactive application of new Fourth Amendment rules to direct-review cases, encompasses retroactive application of the exclusionary rule. Accordingly, the Court's "good faith" jurisprudence is simply inapplicable to warrantless searches impacted by intervening Supreme Court authority.

8. After the Ninth Circuit denied rehearing, the government did not move to stay the mandate. Accordingly, Mr. Gonzalez's case has been remanded back to the district court and a trial has been scheduled for

September 7, 2010. The government has filed a motion to continue trial to allow for this Court's review of the petition for certiorari. The motion to continue is noted for hearing on August 27, 2010.

REASONS FOR DENYING THE PETITION

A. Review Should Be Denied Because the Government Has Previously Represented to this Court that *Gant* Controls.

Mr. Gonzalez's case has already been before this Court once. At that time, the government affirmatively agreed that Mr. Gonzalez's case should be handled "in accordance with" *Gant*. Given that the exclusionary rule was presumed to be the appropriate Fourth Amendment remedy for Mr. Gant, the same should be the case for Mr. Gonzalez.[2] Any other result would be would be fundamentally unfair. This is particularly true since the government agreed to suppression in

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[2]The reason the Supreme Court of Arizona reversed Rodney Gant's conviction was that the Fourth Amendment violation in his case entitled him to suppression. *State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007). In briefing before this Court, neither the State of Arizona, nor the Solicitor General, as amicus, challenged the appropriateness of suppression as a remedy.

the case of Alexander Quintana, the very case with which Mr. Gonzalez was consolidated the last time he was before this Court. Had the government believed that a violation of Mr. Gonzalez's Fourth Amendment rights would not impact the outcome of his case, it should have informed the Court of this position previously. Regardless of the ultimate merits of the government's "good faith" exception analysis, Mr. Gonzalez's case does not provide the appropriate vehicle for review. Doctrines such as waiver, law of the case, and collateral estoppel militate in favor of denying certiorari.

B. The Issue Presented Does Not Involve an Enduring Problem, Affecting a Large Number of Cases.

Contrary to the government's position, the question presented does not involve an enduring legal question. Petition at 20. The issue of whether to exclude evidence seized during a search that preceded *Arizona v. Gant*, which was decided on April 21, 2009, will soon become moot. Furthermore, even where pre-*Gant* searches are at issue, an officer's "good faith" reliance on pre-*Gant* case law is often irrelevant to the ultimate outcome. For example, *Gant* recognized that a police officer can conduct a vehicle search incident to arrest so long as there is reason to believe evidence of the crime of arrest will be found in the car.

Arizona Gant, 129 S.Ct. 1710, 1719 (2009). Numerous pre-*Gant* searches can readily be upheld on this basis. *See Gant*, 129 S.Ct. at 1719 (the facts *Belton* and *Thornton* would have permitted a *Gant* search).[3] In addition, pre-*Gant* searches are often justified by other exceptions to the Fourth Amendment's warrant requirement, such as probable cause[4] or consent.[5] Inventory searches provide an especially

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[3]Other cases finding pre-*Gant* searches valid under the *Gant* standard include *United States v. Vinton*, 594 F.3d 14 (D.C. Cir. 2010); *United States v. Davis*, 569 F.3d 813, 817 (8th Cir. 2009); *United States v. Harris*, No. 09-00385-01-CR-W-DGK, 2010 WL 2265454 (W.D. Mo. April 22, 2010); *Merchant v. State*, 926 N.E.2d 1058 (Ind.App. 2010); *Brown v. State*, 24 So.3d 671 (Fla.App. 2009).

[4] Cases finding a search justified by probable cause include *United States v. Grooms*, 602 F.3d 939 (8th Cir. 2010); *United States v. Kellam*, 568 F.3d 125 (4th Cir. 2009); *United States v. McGhee*, 672 F.Supp.2d 804 (S.D. Ohio 2009); *United States v. Hairston*, No. 09-40033-02-JAR, 2009 WL 3335604 (D. Kan. Oct. 15, 2009).

[5]*United States v. Perez*, No. 09-233, 2010 WL 157501 (E.D. Penn. Jan. 15, 2010).

common means of justification since most cases, unlike Mr. Gonzalez's, involve the arrest of a vehicle's lone occupant.[6] Finally, apart from alternate justifications, impediments to review, such as lack of standing[7] or failing to preserve a pre-trial objection[8] also limit the practical impact on pre-*Gant* searches.

While there may be a handful of state and federal cases where

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[6]Cases upholding pre-*Gant* searches as valid inventories include *United States v. Stitt*, No. 09-4401, 2010 WL 2294588 (4th Cir. June 8, 2010); *United States v. Taylor*, 592 F.3d 1104 (10th Cir. 2010); *United States v. Ruckes*, 586 F.3d 713 (9th Cir. 2009); *United States v. Scroggins*, No. 09-00060-01-CR-W-DW, 2010 WL 750057 (W.D. Mo. Feb. 26, 2010); *United States v. Engle*, 677 F.Supp.2d 879 (E.D. Va. 2009); *Thompson v. State*, No. 2151, 2010 WL 2105663 (Md.App. May 27, 2010); *Pineda v. People*, 230 P.3d 1181 (Colo. 2010).

[7]*United States v. Robertson*, Nos. CIV-10-76-C, CR-07-56-C, 2010 WL 2082233 (W.D. Okla. May 21, 2010).

[8]Cases resolving *Gant* based upon a failure to object pretrial include *United States v. McNair*, 364 Fed.Appx. 54 (4th Cir. 2010) (unpublished), and *Bishop v. State*, 308 S.W.3d 14 (Texas App. 2009).

law enforcement officers seized incriminating evidence solely pursuant to a broad reading of *Belton*, and the defendant had the foresight to preserve an appropriate objection, this small subset of criminal cases does not warrant the Court's involvement.[9] The fact that some litigants have received disparate treatment is not sufficient cause for review. Application of the exclusionary rule to pre-*Gant* searches has already been intractably inconsistent. Some states do not recognize a "good faith" exception to the exclusionary rule. *See State v. Afana*, 233 P.3d 879 (Wash. 2010); *State v. Gutierrez*, 863 P.2d 1052, 1053 (N.M. 1993). Furthermore, as reflected by Alexander Quintana's case, the government has been inconsistent in asserting a good faith defense to a pre-*Gant* search. *See also United States v. Hrasky*, 567 F.3d 367, 369 (8th Cir. 2009) (government agreed that pre-*Gant* search violated the Fourth Amendment and required suppression). This Court's involvement cannot alleviate inequities caused by inconsistent application of the exclusionary rule to the small number of cases

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[9]The government cites six such cases. Petition at 20. Counsel for Mr. Gonzalez is unable to assess whether each of these cases truly depend on retroactive application of the exclusionary rule.

raising valid *Gant* claims. Review is unwarranted to address the few and diminishing cases that might be affected by a decision.

C. The Issue Before the Court Has Already Been Decided by Well-Established Retroactivity Precedent That Requires Application of "New Rules" to All Cases on Direct Appeal.

1. *Gant* itself recognized retroactive application of the suppression remedy.

Although primarily concerned with the substance of the Fourth Amendment, *Gant* also addressed the issue of remedies. The Court's discussion was prompted by the dissent's concerns that *Gant* would "cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law." 129 S.Ct. 1710, 1726 (Alito, J., dissenting). The majority recognized, as noted by the dissent, that its ruling would upset "police reliance interests." 129 S.Ct. at 1723 (2009).[10] Nevertheless, the Court determined that enforcement of the Fourth Amendment was worth this price. 129 S.Ct. at 1722-23.

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[10]The Court's discussion of "reliance interests" was not simply about stare decisis. *Compare* Petition at 16-17. Reliance interests are only of concern when a group of individuals are actually impacted by retroactive application of a remedy.

The Court's only accommodation for past reliance by the police was the announcement that qualified immunity would protect officers from civil liability. *Gant*, 129 S.Ct. at 1722 n.11. By recognizing the applicability of qualified immunity, but not a similar limitation of the exclusionary rule (the very remedy at issue in Mr. Gant's case), the Court made plain its understanding that Mr. Gant had appropriately been awarded the remedy of suppression.

The government's claim that the Court's recognition of qualified immunity signaled an adoption of the "good faith" exception to exclusion is incorrect. Petition at 14. Contrary to the government's assertions, the test for qualified immunity is not the same as that for the good faith exception to the exclusionary rule. "Good faith" and "qualified immunity" are only similar when law enforcement officers operate under the safe harbor of a warrant. *Groh v. Ramirez*, 540 U.S. 551 (2004); *Malley v. Briggs*, 475 U.S. 335 (1986). When it comes to warrantless searches, qualified immunity and the good faith exception operate much differently. *See Pearson v. Callahan*, 129 S.Ct. 808, 822 (2009) (recognizing that suppression can be applied as a remedy in criminal proceedings, even where qualified immunity would protect

against liability); *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (same). Qualified immunity protects a police officer from liability from civil damages so long as his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The good faith doctrine is much narrower. It does not cover all conduct except for obvious violations of the law. "Good faith" is an exception, not the rule. It does not permit police officers to take a "let's-wait-until-it's-decided approach" to constitutional law. *United States v. Leon*, 468 U.S. 897, 912 n.9 (1984).

To the extent the government wants this Court to overrule its precedents and equate the standards for good faith and qualified immunity in all contexts, the instant case is a very poor vehicle for doing so. For one thing, this position was never raised below and, thus, has not been explored by the lower courts. Furthermore, the differences between this case and cases raising difficult questions about qualified immunity are too stark to warrant exploration of this issue. As noted, qualified immunity serves to protect officers faced with novel legal situations, not just situations where they might claim reliance on

settled case law. It is only the former type of cases that raise real debates over application of qualified immunity, since, in the latter scenarios, officers can easily claim that they were not acting in violation of clearly established law. Should the government want the good faith exception to apply as broadly as qualified immunity, the case in which to advance this position would be one where police have been faced with a novel factual and legal scenario, not one where there is a wide body of existing case law. Only when presented with a new, unprecedented situation would the Court be able to fully examine the benefits and costs of having identical tests for qualified immunity and the good faith exception.

2. The Court's retroactivity jurisprudence has rejected a good faith exception to the exclusionary rule for "new" Fourth Amendment rules.

This Court has resolved, through a careful 21-year-long process, that law enforcement officers' reliance on pre-existing case law is not sufficient justification to deny retroactive application of the remedy of suppression. The lead case on direct-review retroactivity is *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Griffith* held that *all* new rules of criminal procedure must be applied retroactively to cases on direct

review. 479 U.S. at 328. The decision reversed a complicated line of retroactivity decisions that started with *Linkletter v. Walker*, 381 U.S. 618 (1965). *Griffith*'s holding was correct and has served as a guide for numerous cases over the past 23 years. It should not be revisited.

Linkletter was decided in the context of the Warren Court's expansive approach to criminal procedure. In order to offset the costs of the new rules created by the Court, *Linkletter*, and the cases that followed, largely limited the availability of remedies to prospective cases. *See Mackey v. United States*, 401 U.S. 667, 675 (1971)(Harlan, J., dissenting). Under *Linkletter*, whether a new rule would apply retroactively to litigants who were harmed prior to its announcement was determined through case-by-case balancing. *See Stovall v. Denno*, 388 U.S. 293, 297 (1967). Eventually, the Court decided that remedies for violations of new Fourth Amendment rules would only apply prospectively. *Desist v. United States*, 394 U.S. 244 (1969).

Linkletter's case-by-case approach to retroactivity spawned much criticism, including a series of dissenting opinions by Justice Harlan. *See Mackey v. United States*, 401 U.S. 667, 675 (1971); *Desist v. United States*, 394 U.S. 244, 256 (1969). *See also* Paul J. Mishkin, *Foreward:*

The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1954). In his ground-breaking dissents, Justice Harlan carefully weighed the competing interests of reliance, on the one hand, and certainty, fairness, and sound judicial administration, on the other, and held that the latter were more compelling. As such, Justice Harlan rejected the Court's refusal to incur the costs of its various new rules by taking a prospective approach. Instead, Justice Harlan argued that all new constitutional rules should be applied equally to litigants on direct review.

This Court rejected *Linkletter*'s analysis and moved toward Justice Harlan's approach in *United States v. Johnson*, 457 U.S. 537, 548 (1982)("We now agree with Justice Harlan that retroactivity must be rethought")(quotation omitted). *Johnson* held that new rules should be applied retroactively to all cases pending direct review, except for those that marked a "clear break" with the past. 457 U.S. at 551. In *Griffith*, the Court abandoned the "clear break" limitation. 479 U.S. at 328. *Griffith* explicitly adopted Harlan's approach to direct review cases in its entirety. *Griffith*, 479 U.S. at 322. As it currently stands, retroactivity doctrine requires that new rules apply to all pending

cases, regardless of any impact on past reliance.

The government's claim that this Court's retroactivity jurisprudence is "not at all about the good faith exception to the exclusionary rule" is inaccurate. Petition at 15. While most of the Court's retroactivity jurisprudence predated *United States v. Leon*, 468 U.S. 897 (1984), the bulk of the debate about retroactivity directly involved the exclusionary rule. Indeed, the Court's first retroactivity case, *Linkletter v. Walker*, concerned retroactive application of the exclusionary rule to the States. Justice Harlan's seminal dissents concerned retroactive application of the exclusionary rule after *Chimel v. California*, 395 U.S. 752 (1969), and *Katz v. United States*, 389 U.S. 347 (1967). *See Mackey*, 401 U.S. at 676; *Desist*, 394 U.S. at 256. A key rationale for resistence to retroactivity was that it would entail application of the exclusionary rule, despite little deterrent value and burdens on the administration of justice. *Desist*, 394 U.S. at 249-51. Justice Harlan recognized as much, noting that, under his approach, retroactivity would require "release [of] criminals from jail," despite law enforcement's justifiable reliance on pre-existing case law. *Mackey*, 401 U.S. at 677-79. The debates in *Desist* and *Mackey* demonstrate that,

contrary to having nothing to do with the exclusionary rule, this Court's retroactivity jurisprudence is intimately intertwined with debate over its application.

A critical error in the government's analysis, as well as that of the appellate courts in its favor, is the separation of a litigant's right to retroactive application of a "new rule" and the availability of a remedy. *See United States v. Davis*, 598 F.3d 1259, 1265 (11th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1044 n.5 (2009); *State v. Baker*, 229 P.3d 650, 664-65 (Utah 2010). As this Court recently explained, retroactivity and the availability of a remedy go hand-in-hand: "What we are actually determining when we assess the 'retroactivity' of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008).

The approach advanced by the government and the opposing appellate courts fails to appreciate what this Court made crystal clear in *Danforth*. The government has agreed that *Gant* is retroactive to Mr. Gonzalez. Given this concession, the outcome is straightforward; Mr.

Gonzalez is entitled to redress. In the criminal context, the only available redress for a Fourth Amendment violation is suppression. *Mapp v. Ohio*, 367 U.S. 643 (1961).

D. Stare Decisis Counsels Against Accepting the Government's Invitation to Hold that *Gant* Overruled *Belton*.

The government, along with the lower court decisions cited in its favor, urge application of the good faith exception based upon the claim that *Gant* effectively overruled *New York v. Belton*, 453 U.S. 454 (1981). *See* Petition at 12 & n.3; *United States v. Davis*, 598 F.3d 1259, 1266 (11th Cir. 2010); *State v. Baker*, 229 P.3d 650, 663-65 (Utah 2010). According to the government's reasoning, good faith should apply because officers were entitled to rely on *Belton*'s "settled law," which permitted a vehicle search any time police arrested a recent occupant. The *Baker* court claimed that broad *Belton* searches were "deemed constitutional by both the Supreme Court and this court." *Baker*, 229 P.3d at 664. The Eleventh Circuit asserted that a broad interpretation of *Belton* was "clear and well-settled." *Davis*, 598 F.3d at 1266.

Not only is this "settled law" approach inconsistent with *Griffith v. Kentucky*, 479 U.S. 314 (1987), as explained above, it is also

inconsistent with *Gant* itself. Because a majority of the Justices in *Gant* rejected the dissent's view that the decision overturned *Belton*, *Gant* emphatically did not overrule *Belton*. 129 S.Ct. at 1722 n.9. Despite comments made in his concurring opinion, Justice Scalia joined the *Gant* majority in full. 129 S.Ct. at 1275 (Scalia, J., concurring). Rather than overturn *Belton*, *Gant* made clear that it was addressing a new set of facts and legal arguments, never before considered by the Court. 129 S.Ct. at 1722.

To the extent that the government and lower courts refuse to accept that *Gant* did not overrule *Belton*, their reasoning is unpersuasive. It is reminiscent of the refusal to honor the analysis of *Kimbrough v. United States*, 552 U.S. 85 (2007), in *Spears v. United States*, 129 S.Ct. 840 (2009)(per curiam), and *Moore v. United States*, 129 S.Ct. 4 (2008)(per curiam), and the failure to abide by *Rita v. United States*, 551 U.S. 338 (2007), in *Nelson v. United States*, 129 S.Ct. 890 (2009). To the extent that the government's position is fueled by disagreement with *Gant*'s analysis, it is inopportune. The Court should not revisit *Gant* just two years after it was issued and one year after its author's retirement from the Court. Stare decisis compels adherence to

Gant, lest public confidence in the Court be undermined by the impression that constitutional rules depend on the makeup of the Court, not the constitution itself. A change in the Court's membership is not a reason to revisit *Gant*. *Cf. Briscoe v. Virginia*, 130 S.Ct. 1316 (2010) (rejecting merits review of a case that would have involved reconsideration of *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009)).

CONCLUSION

This Court has already decided that police officers' reliance on case law does not permit denying the remedy of suppression to a litigant on direct review. The issue should not be revisited, particularly in a case, such as this one, that presents such a poor and unfair vehicle for review. The petition for certiorari should be denied.

Respectfully Submitted, August 12, 2010.

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